Supreme Court, U.S.
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MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

No. 79-329

RALPH J. SKINKISS,

Appellant,

-against-

OWENS-CORNING FIBERGLAS CORPORATION,

Appellee,

ON APPEAL FROM THE OHIO SUPREME COURT

JURISDICTIONAL STATEMENT

Ralph J. Skinkiss
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Toledo, Ohio 43617

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IN THE
SUPREME COURT OF THE UNITED STATES

No._____

RALPH J. SKINKISS,

Appellant,

-against-

OWENS-CORNING FIBERGLAS, CORP.,

Appellee,

ON APPEAL FROM THE OHIO SUPREME COURT

INTRODUCTION

Appellant appeals to this Court from an order of the Ohio Supreme Court entered on May 10, 1979, denying appellant's request for Rehearing of the Ohio Supreme Court's order of April 12, 1979, dismissing appellant's appeal of right, upon Constitutional issues, to the Ohio Supreme Court from the Lucas County Court of Appeals, Lucas County Ohio, wherein appellant's appeal from a summary judgment in the Lucas County

Court of Common Pleas, was summarily dismissed pursuant to the unconstitutionally vague Ohio Rules of Appellate Procedure and without affording appellant the opportunity to produce argument in defense of such dismissal thereby denying appellant due process and the equal protection of the law as guaranteed by Article I Section 16 of the Constitution of Ohio and the Fourteenth Amendment to the Constitution of the United States. Appellant submits this statement to show that the Supreme Court of the United States has jurisdiction to hear this appeal and that a substantial question is presented.

OPINION BELOW

No opinions have been entered or reported below.

JURISDICTION

Appellant's cause of action to this Court is based upon Rule 54 (A) of the Ohio Rules of Civil Procedure; Rule 4(A) of the Ohio Appellate Rules, Section 2505.02 of the Ohio Revised Code, Article I Section 5 and Article IV Section 3 (b)(2) of the Ohio Constitution. Appellant appealed to the Lucas County

Court of Appeals, Lucas County Ohio from an order in the Lucas County Court of Common Pleas granting a summary judgment against appellant and subsequent denial of appellant's motion for rehearing of said summary judgment. The Lucas County Court of Appeals dismissed appellant's appeal as not having been timely filed and as constituting an appeal from a non-appealable order and without hearing argument upon the issue by either party. Appellant appealed the Lucas County Court's dismissal of his cause to the Ohio Supreme Court upon Constitutional issues. The Ohio Supreme Court dismissed appellant's appeal as presenting no substantial question by its order of April 12, 1979. Appellant's timely motion for rehearing by the Ohio Supreme Court was further denied by the Ohio Supreme Court's order of May 10, 1979, from which appellant appeals to this Court.

A notice of appeal was filed on July 23, 1979 with the Clerk of the Ohio Supreme Court and with the Clerk of the Lucas County Court of Appeals, Lucas County Ohio. The jurisdiction of this Court to hear this appeal is conferred

by 28 USC 1257 (2) and by Communist Party of Indiana v. Whitcomb, 414 U.S. 441 (1974).

RULES AND STATUTES INVOLVED

Involved in appellant's appeal to this Court are the following relevant portions of the Ohio Constitution, Ohio Revised Code and Ohio Rules of Appellate Procedure:

Article I, Section Five of the Ohio Constitution provides that:

> "The right of trial by jury shall be inviolate..."

Article IV Section 3 (b)(2) of the Ohio Constitution:

> "Courts of appeals shall have such jurisdiction as may be provided by law to review and affirm, modify, or reverse judgments or final orders of the Courts of record inferior to the Court of Appeals..."

Section 2505.02 of the Ohio Revised Code:

> "An order affecting a substantial right in an action which in effect determines the action and prevents judgment...is a final order which may be reviewed, affirmed, modified, or reversed, with or without retrial."

Rule 4 (A) of the Ohio Appellate Rules:

> "In a civil case the notice of appeal required by Rule 3 shall be filed...within thirty days of the date of the entry of the judgment or order appealed from."

Rule 54 (A) of the Ohio Rules of Civil Procedure:

> "Judgment...includes a decree and any order from which an appeal lies."

QUESTIONS PRESENTED

I. Are the Ohio Rules of Appellate Procedure unconstitutionally vague and indefinite by failing to clearly define appealable issues for which the Courts of Appeal have jurisdiction to hear, modify or reverse and thereby failing to provide for equal protection of the laws and guarantee procedural due process of the law as guaranteed under Article I, Section Sixteen of the Ohio Constitution and the Fourteenth Amendment of the Constitution of the United States of America?

II. Is dismissal for lack of jurisdiction by the Lucas County Court of Appeals of an action wherein appellee had failed to raise such a defense and appellant was not otherwise afforded the opportunity to present argument against such dismissal a denial of procedural due process of law as guaranteed under Article I, Section Sixteen of the Constitution of Ohio and the Fourteenth Amendment to the Constitution of the United States of America?

III. Where plaintiff demands a jury trial as provided under Article I Section Five of the Constitution of Ohio, has the trial Court denied plaintiff due process and equal protection of the laws as guaranteed by Article I Section Sixteen of the Ohio Constitution and the Fourteenth Amendment of the Constitution of the United States of America when in granting the defendant's motion for summary judgment the trial court makes and enters its finding of disputed fact pursuant to Rule 52 of the Ohio

Rules of Civil Procedure?

IV. Where the Trial Court grants defendant's motion for summary judgment and defendant subsequently moves the court under Rule 52 of the Ohio Rules of Civil Procedure for an entry of findings of fact and conclusions of law and proffers to the court its recommended order modifying the courts earlier decision and the court grants defendant's motion and adopts defendant's recommended order is the final appealable order pursuant to Section 2505.02 of the Ohio Revised Code the later order modified by the Court and adopting defendant's recommended findings of fact and conclusions of law and by not so recognizing such order as final and appealable has the Lucas County Court of Appeals denied appellant due process and the equal protection of the laws guaranteed by Article I, Section Sixteen of the Ohio Constitution and the Fourteenth Amendment of the Constitution of the United States of America?

STATEMENT OF THE CASE

This case arises from a breach of contract action involving an offer of employment by appellee to appellant, a timely acceptance of such offer and detrimental reliance upon the offer by appellant, and the appellee's subsequent repudiation of appellant's acceptance, thereby causing appellant significant damages.

Appellant filed his action for breach of contract and award of damages against appellee on July 11, 1977, in the Lucas County Court of Common Pleas. Subsequent to exchanges of interrogatories by both parties, appellee filed its motion for summary judgment. Appellant, on January 20, 1978, timely filed his opposition to appellant's motion for summary judgment calling to the Court's attention misrepresentations of facts in appellee's brief.

Appellant, on February 13, 1978, moved the court to compel appellee pursuant to Rule 33 (A) of the Ohio Rules of Civil Procedure, to answer interrogatories under oath of the person making them. Appellee failed to timely file

its brief in opposition to appellant's motion.

Judge Pietrykowski, without oral argument, ruled in favor of appellee's motion for summary judgment by his decision dated February 15, 1978.

Judge Pietrykowski's decision was silent with respect to appellant's pending motion to compel appellee to answer interrogatories under oath of the person making them as required under Rule 33 (A).

Appellee on February 20, 1978, moved the Court, under Rule 52 of the Ohio Rules of Civil Procedure, for entry of findings of fact and conclusions of law in regard to the granting of appellee's motion for summary judgment. Appellee's motion for entry of findings of fact presented the same misrepresentations of fact objected to by appellant's brief in opposition to appellee's motion for summary judgment. Appellant timely filed his brief in opposition to appellee's motion for entry of finding of fact by the court, arguing that such an entry was not appropriate under Rule 52 and that appellee's motion called for

the court to make a finding of disputed fact which was improper in a summary judgment.

Appellant, on February 21, 1978, pursuant to Rule 14.11 of the Lucas County Rules, moved the Court for a rehearing of its February 15, 1978 decision arguing that the Courts action deprived appellant the equal protection of the laws of the State of Ohio.

Judge Pietrykowski, on April 17, 1978, entered his "Findings of Fact, Conclusions of Law Judgment Entry" adopting word for word the misstated statement of fact as proffered by the appellee and objected to by appellant. Judge Pietrykowski's judgment entry further dismissed appellant's motion (filed February 13, 1978) to compel appellee to answer interrogatories under the oath of the person making them as required by Rule 33 (A) of the Ohio Rules of Civil Procedure. By separate order, on April 17, 1978, the court also denied appellant's request for rehearing.

Appellant, on May 12, 1978, filed with the Clerk of the Court of Common Pleas, Lucas County, Ohio his notice of appeal to the Lucas County Court of

Appeals of Judge Pietrykowski's February 15, 1978 decision, the April 17, 1978 Findings of Fact, Conclusions of Law, Judgment Entry and the April 17, 1978 denial of appellant's request for rehearing of the February 15, 1978 decision.

Appellant timely filed his appeal brief in the Lucas County Court of Appeals on June 12, 1978. Appellee filed its brief on June 29, 1978 to which appellant filed his reply brief on July 12, 1978.

The Lucas County Court of Appeals set December 28, 1978 for oral argument, however, on December 22, 1978 the Court of Appeals dismissed appellant's appeal for failure of appellant to file a timely notice of appeal from Judge Pietrykowski's decision of February 15, 1978.

Pursuant to Rule 26 of the Ohio Appellate Rules, appellant, on January 3, 1979, timely filed his request for reconsideration of the Court's dismissal arguing that such dismissal without argument therefore by appellee and without affording appellant the opportunity to present his defense in opposition to such dismissal denied appellant due

process and the equal protection of the law as guaranteed by Article I, Section Sixteen of the Ohio Constitution and the Fourteenth Amendment to the Constitution of the United States. Appellee filed its motion to strike and memorandum opposing appellant's application for reconsideration of January 9, 1979. The Lucas County Court of Appeals, on January 11, 1979, denied appellant's motion for reconsideration and ruled appellee's motion to strike moot.

Appellant timely filed his notice of appeal to the Ohio Supreme Court with the Clerk of the Lucas County Court of Appeals on January 19, 1979. Appellant timely filed his memorandum in support of the appeal with the Clerk of the Ohio Supreme Court on February 20, 1979, arguing inter alia the unconstitutionality of the Ohio Rules of Appellate Procedure and Section 2505.02 of the Ohio Revised Code as being indefinite and vague. Appellee, on March 10, 1979, filed its memorandum opposing jurisdiction.

The Ohio Supreme Court, on April 12, 1979 without oral argument, dismissed appellant's appeal to which appellant on

April 23, 1979, pursuant to Rule IX of the Rules of Practice of the Supreme Court of Ohio, timely filed his motion for reconsideration to which appellee filed its opposition to appellant's motion. Appellant's motion was denied by the Ohio Supreme Court by its order of May 10, 1979.

Upon the above record and without having had a single oral argument below this cause comes before this Honorable Court.

THE QUESTIONS ARE SUBSTANTIAL

Appellate jurisdiction is granted by the Ohio Constitution, Article IV, Section 3 (b)(2) by providing:

> "Courts of appeals shall have such jurisdiction as may be provided by law to review and affirm, modify, or reverse judgments or final orders of the Courts of record inferior to the Court of Appeals..." (emphasis added)

Thus the Ohio Constitution grants power to the Appellate Courts to review "judgments or final orders."

Section 2505.02 of the Ohio Revised Code defines "final order" as:

> "An order affecting a sub-

stantial right in an action which in effect <u>determines the action and prevents judgment ...is a final order</u> which may be reviewed, affirmed, modified, or reversed, with or without retrial."
(emphasis added)

Rule 54 (A) of the Ohio Rules of Civil Procedure defines judgment as:

"Judgment as used in these rules includes a decree and <u>any order</u> from which an appeal lies."
(emphasis added)

Thus Appellate jurisdiction applies only to reviewing of "judgments" or "final orders." A "final order" is defined as an order which "prevents judgment." However, "judgment" is defined as "any order from which an appeal lies." Thus one must first know what is appealable before one can identify a judgment; and one must know what a judgment is before one can identify a final order.

Considering the question from another view point: A final order (which is appealable) is one which prevents a judgment. A judgment is any order from which an appeal lies. Therefore, combining the two definitions, a "final

order" is an order preventing any order from which an appeal lies.

Thus the Ohio Appellate Rules are vague and indefinite as no clear definition exists as to what constitutes a judgment or final order and is thus appealable.

Confusing the issue further is Ohio Appellate Rule 4 (A) which provides:

"In a civil case the notice of appeal... shall be filed...within thirty days of the date of the entry of the <u>judgment or order</u> appealed from."
(emphasis added)

Since a "judgment" and a "final order" are indefinite one is left to guess just what is the appealable order from which he must file his notice of appeal. And his guess must be consistant with the mind of the Appellate Court as to what in their opinion the Appealable order was.

It is a general principle that a statute or rule which requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law. <u>Cramp v</u>.

Board of Public Instruction, 368 U.S.278; United States v. Spector, 343 U.S. 169; United States v. Petrillo, 332 U.S. 1; United States v. Darby, 312 U.S. 100; Pearson v. Probate Ct., 309 U.S. 270; Kay v. United States, 303 U.S. 1.
This Honorable Court has held that a non-criminal statute is unconstitutionally vague if men of common intelligence must necessarily guess at its meaning. Old Dearborn Distributing Co. v. Seagram Distillers Corp., 299 U.S. 81; Neblett v. Carpenter, 305 U.S. 297; Keyishian v. Board of Regents, 385 U.S. 589.

Appellant was not the only one confused respecting the appealable order in the case at bar. Appellee also believed the April 17, 1978 "Judgment Entry" to be in fact the final and appealable order as appellee offered no argument or challenge to the timeliness of appellant's notice of appeal nor the Appellate Court's jurisdiction to hear the appeal.

A state may prescribe rules as to appellate procedure. However, a party otherwise entitled to appeal who, by the construction of a statute or rule, is prevented from doing so where such right

is given to all others in similar cases, is thus deprived of the right of due process of law. State ex. rel. J. Hahn Bakery Co. v. Anderson, 269 Mo. 381, 190 S.W. 857. A state may regulate the procedure of its courts in accordance with its own conception of fairness unless it offends some principle of justice held to be fundamental. Among such fundamentals is the requirement of notice and hearing. Hooker v. Los Angeles, 188 U.S. 314; Rogers v. Peck, 199 U.S. 425; People's Wayne County Bank v. Wolverine Box Co., 230 N.W. 170.

The citations are endless for the principle that procedural due process requires that one against whom it is sought to deprive of a legal right must be given notice of that fact and must be given an opportunity to offer his defense to such deprivation. It is a rule as old as law itself that no one shall be personally deprived of his legal rights until he has had his day in court, namely that he be afforded an opportunity to be heard. Judgment without such opportunity lacks all attributes of a judicial determination; it is judicial usurpation and oppression and

can never be upheld where justice is fairly administered. Snyder v. Massachusetts, 291 U.S. 97; Powell v. United States, 287 U.S. 45; Blackmer v. United States, 284 U.S. 421; Hardware Dealers Mut. Fund Ins. Co. v. Glidden Co., 284 U.S. 151; Brinkerhoff-Faris Trust & Savings Co. v. Hill, 281 U.S. 673. Couched in the language of procedural due process is the proposition that due process of law generally implies and includes an opportunity to answer and a trial according to a settled course of judicial proceedings. King v. Panther Lumber Co., 171 U.S. 437; King v. Mullins, 171 U.S. 404; Anderson National Bank v. Luckett, 321 U.S. 233. There can be no doubt that all of the above cited precedents plus an endless number of state decisions require, at a minimum, that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing. Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306.

In the case at bar the question of lack of jurisdiction for failure to timely file a notice of appeal had not been raised before the Lucas County

Court of Appeals by the appellee in its appeal brief. The Court's dismissal of appellant's appeal upon this ground and without affording appellant an opportunity to be heard was arbitrary without precedent and an usurpation of appellant's procedural rights as guaranteed by Article I, Section Sixteen of the Ohio Constitution and the Fourteenth Amendment to the Constitution of the United States.

Appellant pursuant to Ohio Appellate Rule 26, timely filed his request for reconsideration to the Lucas County Court of Appeals upon the grounds that appellant was deprived due process of law by the Courts summary dismissal of appellant's action. The court denied appellant's request.

Appellant has been denied procedural due process in violation of the guarantees provided under the Ohio Constitution and the Constitution of the United States by the Appellate Court's refusal to grant appellant the opportunity to present arguments against dismissal for lack of jurisdiction.

The Ohio Appellate procedure with respect to the question of what consti-

tutes a final appealable order has long been confusingly vague. It has been proposed that the question to be answered in determining whether a final appealable order has been rendered in Ohio is: "Can I win my case in this Court, and have the same opportunity which I believe is coming to me regardless of this particular decision against me?" What is a Final Order in Ohio, 19 Cin. L. Rev. 522. If the above question is answered in the affirmative it is advised that the order being tested for finality is not final and therefore not appealable; if answered in the negative, the order is final and appealable. Reasonable minds can differ as to the answer to this question when applied to a given set of facts.

Article I, Section Five of the Ohio Constitution provides that:

> "The right to trial by jury shall be inviolate..."

It has been held in Ohio that the right to a jury trial is a substantial right and does not involve merely a question of procedure, Ry v. Halliday, 127 O.S. 278.

Appellant in his action before the

Lucas County Court of Common Pleas, on August 23, 1977, timely demanded a trial by jury pursuant to Rule 38 (B) of the Ohio Rules of Civil Procedure. The trial court violated appellant's right to have a jury determine the issues of fact in dispute between the parties by entering its finding of disputed fact pursuant to appellee's motion under Rule 52 of the Ohio Rules of Civil Procedure which only provide for determination of fact when questions of fact are tried to the court without a jury. Such finding of disputed fact was entered by the Lucas County Court of Common Pleas by its order dated April 17, 1978, two full months after its February 15, 1978 order granting appellee's motion for summary judgment.

If appellant had been required to file his notice of appeal within thirty days of Judge Pietrykowski's February 15, 1978 decision it would have been necessary to file such notice on or before March 17, 1978 or at least thirty one (31) days prior to Judge Pietrykowski's order of April 17, 1978. At this date (March 17, 1978) appellant could not be aware of all issues or questions to be

appealed because of the motions then pending before the Court.

Allowing seven (7) days for the Clerk of Lucas County Court of Common Pleas to file the trial court record in the Court of Appeals (as was the case in the present action) the appellant would have been required to file his appeal brief on or before April 13, 1978, (twenty days after transfer of the record to the Court of Appeals pursuant to Rule 18 (A) of the Ohio Rules of Appellate Procedure) or at least four (4) days prior to Judge Pietrykowski's final order of April 17, 1978.

Thus if appellant had been required to file his notice of appeal within (30) thirty days of Judge Pietrykowski's February 15, 1978 decision appellant would have been required to file his appeal brief at least four (4) days in advance of having full knowledge of all assignments of error and four (4) days before the courts denial of his motion for rehearing.

The trial court abused its descretion by not advising appellant of its ruling on appellee's motion for findings of fact and conclusions and appellant's

timely filed motion for rehearing for a period of two months.

Section 2505.02 of the Ohio Revised Code has been held to define a final order as one which affects a substantial right in an action and in effect determines the action and prevents possibility of any further proceedings by the court respecting the merits of the cause. Jolley v. Martin Brothers Box Co., 158 O.S. 416; Roof v. National Surety Corp., 92 App. 295. A decree has been held to be final only when it disposes of all issues and leaves nothing further within the jurisdiction of the court for its further consideration or decision. Kelly v. Stanberg, 13 O. 408; Teaff v. Hewitt, 1 O.S. 511; Cincinnati S. & C.R. Co. v. Sloan, 31 O.S. 1.

Thus an order has been held not final or appealable until it is in fact final and there remains no possibility for the court to further review or consider the merits of the action before it. National Surety Corp. v. Blackburn, 58 O.L. Abs. 193.

In the case at bar appellant, pursuant to Rule 14.11 of the Lucas County Court Rules, timely filed his motion for

rehearing of Judge Pietrykowski's February 15, 1978 decision granting appellee's motion for summary judgment. Thus by appellant's motion the court retained jurisdiction of the cause and possessed the power to vacate Judge Pietrykowski's February 15, 1978 decision. Therefore, the February 15, 1978 decision was not a final order and not appealable pursuant to judicial definitions of a final order under RC 2505.02.

The final and appealable order in the case at bar was the court's denial of appellant's motion for rehearing on April 17, 1978, as until that order was entered, a possibility existed that the court might grant said rehearing and upon such vacate or reverse its decision of February 15, 1978. The cause of action was not, in fact, finally decided by the Lucas County Court of Common Pleas until appellant was denied his motion for rehearing. National Surety Corp. v. Blackburn, supra; Cox v. Cox, 104 O.S. 611.

Thus both the Lucas County Court of Common Pleas and the Lucas County Court of Appeals have denied appellant due process and the equal protection of the

laws of the State of Ohio.

In summary the Lucas County Court of Common Pleas erred by deciding issues of disputed facts and granting appellee's motion for summary judgment thereby depriving appellant due process and the equal protection of the laws of the State of Ohio. The Lucas County Court of Appeals, by dismissing appellant's appeal from the Lucas County Court of Common Pleas, further denied appellant his right to due process and the equal protection of the laws of the State of Ohio. Consequently the questions presented by this case are substantial and appellant urges this Court to note probable jurisdiction and set the Cause for oral argument, or, in the alternative, summarily reverse the decisions below and remand this Cause for trial on the merits to the Lucas County Court of Common Pleas.

Dated: Toledo, Ohio
August 1, 1979

Respectfully Submitted,

SS

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Jurisdictional Statement and Motion for Summary Reversal was served upon John G. Mattimoe Esq., attorney for Appellee below, by mailing a copy to him by first-class mail, postage paid on this_____day of August 1979.

Ralph J. Skinkiss